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No. 86-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

YURI FASHIONS CO., LTD.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE*, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, IN SUPPORT OF PETITION

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The Commonwealth of the Northern Mariana Islands ("CNMI"), through its Attorney

General, hereby appears as amicus curiae and offers the following points and authorities in support of the petition of Yuri Fashions Co., Ltd., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case (Petitioner's Appendix 1a (hereinafter "Pet. App.")), which affirmed the opinion and judgment of the United States Court of International Trade, 11 CIT ___, 632 F. Supp. 41 (1986) (Pet. App. 3a).

INTEREST OF AMICUS CURIAE

The CNMI, as amicus curiae, hereby appears by its Attorney General in this case pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in view of its direct and substantial interest in the outcome of this litigation. Petitioner asserts that any merchandise imported into the United States from the CNMI which satisfies

the provisions of General Headnote 3(a) of the Tariff Schedules of the United States ("TSUS"), 19 U.S.C. 1202 (Pet. App. 94a), may lawfully enter the United States duty-free as a product of the CNMI. Petitioner has also asserted that regulations issued by the U.S. Treasury Department in 19 C.F.R. 12.130 (Pet. App. 105a-108a) do not lawfully apply to the CNMI and so are of no force and effect in determining the country of origin of merchandise imported into the customs territory of the United States from the CNMI. The CNMI, as amicus curiae, joins in support of these arguments advanced by petitioner.

The resolution of the issues presented herein has far-reaching implications for the CNMI, affecting not only the tariff and duty status of its products but also its economic viability, commercial development, and the employment and well-being of its populace. While the regulation challenged herein

affects all the insular possessions of the United States, the subject merchandise involved in this litigation was imported from the CNMI. The CNMI did, in fact, intervene as amicus curiae on behalf of petitioner herein before the Court of International Trade.

REASONS FOR GRANTING THE WRIT

The CNMI joins in the statement of the factual and legal issues and reasons for granting of the writ presented in the petition for a writ of certiorari, filed with this Court on February 13, 1987. Additionally, however, amicus curiae wishes to set forth certain reasons in favor of this Court's review of this case which are of particular importance to the CNMI.

I. The lower courts have decided an important question of federal law in a manner in conflict with the federal government's obligations to the CNMI embodied in the Trusteeship Agreement and Covenant.

Amicus curiae, the CNMI, is a new member of the American political family, having voted to associate itself in a close political relationship with the United States by approving the "Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Union with the United States," Pub. L. 94-241, 90 Stat. 263 (1976), reprinted as amended in 48 U.S.C. 1681 note (hereinafter "Covenant") (Pet. App. 87a-93a). As such, its residents and industries are not properly regulated under the foreign affairs powers of the President exercised pursuant to section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. 1854 (Pet. App. 86a).

Although it has been held in Mast Industries, Inc. v. Regan, 8 CIT 214, 596 F. Supp. 1567 (1984), appeal dismissed, (Fed. Cir. February 26, 1985), that the delegation of authority to regulate foreign commerce generally under section 204 was a valid delegation to the President by Congress, the CNMI submits that it is not lawfully subject to regulations issued by the Customs Service pursuant to that section because of its close political association with the United States of America. The lower courts erred in holding to the contrary as they failed to consider the unique features of that relationship which are embodied in the Trusteeship Agreement between the United States and the United Nations and the Covenant between the United States and the CNMI.

The CNMI was, until November 1986, a part of the Trust Territory of the Pacific Islands ("TTPI") which had been administered

by the United States since 1947 as a United Nations trusteeship. Pursuant to Article 3 of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, April 2, 1947, 8 U.N.T.S. 189, T.I.A.S. No. 1665, ratified by Congress July 18, 1947 (hereinafter "Trusteeship Agreement") (Pet. App. 80a-85a), the United States exercised "full powers of administration, legislation and jurisdiction..." under the supervision of the United Nations Security Council. The Trusteeship Agreement also imposed specific obligations upon the United States as the administering authority.

Article 6(1) of the Trusteeship Agreement required the United States to "...promote the development of the inhabitants of the Trust Territory toward self-government or independence..." as elected by the "...freely expressed wishes of the peoples concerned." Article 6(2) also required that

the United States "[p]romote the economic advancement and self-sufficiency of the inhabitants, and to this end shall...encourage the development of fisheries, agriculture, and industries."

In 1954 the Congress authorized administration of the TTPI by the Executive Branch by providing that the powers of administration granted to the United States in the Trusteeship Agreement be "...exercised in such manner and through such agency or agencies as the President of the United States may direct..." until such time as Congress should provide otherwise. 48 U.S.C. 1681(a). This agency was conferred upon the Secretary of the Interior by virtue of Executive Order 11021, 27 Fed. Reg. 4409 (1962), as amended by Executive Order 11944, 41 Fed. Reg. 42715 (1976); and the Secretary, in turn, delegated it to the Government of the Trust Territory of the Pacific Islands. See,

e.g., Department of Interior Order No. 2918, December 27, 1968, 34 Fed. Reg. 157 (1969). Thus, the Trust Territory of the Pacific Islands was a creature of federal law and depended upon its capacity as an agency of the federal government for its legitimacy.

Even the High Court of the Trust Territory of the Pacific Islands itself has long recognized that "...the Trust Territory Government seems clearly intended to come within the meaning of the words 'such agency or agencies as the President of the United States may direct or authorize as used in 48 U.S.C. Sec. 1681(a).'" Alig v. Trust Territory of the Pacific Islands, 3 T.T.R. 603, 612-613 (H.C. App. Div. 1967). Furthermore, courts have consistently held the TTPI not immune from suit in United States courts under the Foreign Sovereign Immunities Act, 28 U.S.C. 1602, because it was not a government of a foreign country.

People of Saipan v. U.S. Dep't of the Interior, 356 F. Supp. 645 (D. Haw. 1973), affirmed as modified on other grounds, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975); Sablan Construction Co. v. Government of the TTPI, 526 F. Supp. 135 (D.N.M.I. 1981); World Communications Corp. v. Micronesian Telecommunications Corp., 456 F. Supp. 1122 (D. Haw. 1978).

During the trusteeship period it was recognized that the trusteeship was not a permanent relationship. Negotiations with the United States to determine the future political status of the islands of the TTPI were requested as early as 1966, and formal negotiations actually began in September, 1969. Liebowitz, The Marianas Covenant Negotiations, 4 Fordham Int'l L. J. 19, 20 (1981). The Northern Mariana Islands participated as a part of Micronesia's Joint Committee on Future Status along with

representatives of the other Micronesian island groups until it became clear that many of the other Micronesian representatives wanted to consider full independence as one of the status options. In April 1972 the Northern Mariana Islands' representatives indicated that they did not wish to pursue independence as a political status goal, and requested separate status negotiations to create a closer and more permanent relationship with the United States for the Northern Mariana Islands. This was not surprising as the people of the Northern Mariana Islands had persistently petitioned for termination of the trusteeship and incorporation of the Northern Mariana Islands into the United States as a territory beginning as early as 1951. See generally, To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands": Hearing on H.J.

Res. 549, H.J. Res. 550, H.J. Res. 547 Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. 403 (1975) (statement of F. Hayden Williams, the President's personal representative) (hereinafter cited as "House Hearing").

These separate negotiations resulted in the signing of the Covenant on February 15, 1975. The Covenant was overwhelmingly approved by the people of the Northern Mariana Islands with a 78.8% majority vote in a plebiscite conducted on June 17, 1975, and enacted into federal law on July 10, 1975. All sections of the Covenant became fully effective on November 4, 1986. Pres. Proc. 5564, 51 Fed. Reg. 40399 (1986) (Pet. App. 97a).

By virtue of section 101 of the Covenant, the United States acquired sovereignty over the Northern Mariana Islands. By virtue

of section 104 of the Covenant, the United States acquired "...complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands." In section 105, the United States acquired the authority to "...enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands," and in section 301, the people of the Northern Mariana Islands acquired U.S. citizenship. Section 304 entitles citizens of the CNMI to the privileges and immunities of citizens of the several States of the United States. Sections 401 and 402 establish a Federal District Court for the Northern Mariana Islands.

Article V of the Covenant makes appropriate provisions of the Constitution and laws of the United States applicable in the CNMI. Section 603 excludes the CNMI from

the customs territory of the United States but makes imports from the Commonwealth into the United States eligible for duty-free entry pursuant to General Headnote 3(a), TSUS, in accordance with the tariff treatment afforded to Guam.[1]

It is clear that these trade provisions were of great importance to the Marianas status negotiators and to the voters who approved the Covenant. During the public education campaign preceding the plebiscite, section 603 was explained as follows:

> Essentially, this means that Northern Marianas goods will enter the customs territory--consisting of the states and the Commonwealth of Puerto Rico--duty free, provided that 50 percent

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1. Section 603 had entered into force prior to the importation of the subject merchandise and thus defines the tariff treatment of CNMI articles for the purposes of this litigation.

> or less of the value of the product (whether manufactured, produced or grown) derives from foreign materials,... This treatment of Northern Mariana Islands goods is a significant benefit, for it encourages industry in the Marianas to produce goods which can be shipped duty-free into the United States.

House Hearings, supra, at 647 (Marianas Political Status Comm'n, Section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands).

Section 701 of the Covenant provides for United States financial assistance to the CNMI to "...assist the Government of the Northern Mariana Islands in its efforts to achieve a progressively higher standard of living for its people as part of the American economic community and to develop the

economic resources needed to meet the financial responsibility of local self-government" (emphasis supplied).

Section 204 of the Agricultural Act is intended to allow the President to negotiate agreements with "foreign governments" to limit the export of certain textiles and textile products of such countries to the United States. The CNMI cannot be considered to be such a foreign country in light of its political union with the United States. Congressional authority to legislate for the Trust Territory, and so for the Northern Mariana Islands, was recognized to emanate from the Territorial Clause of the Constitution of the United States, Article IV, section 3, clause 2. See Ralpho v. Bell, 569 F.2d 607, 618, reh. denied, 569 F.2d 636 (D.C. Cir. 1977). Section 105 of the Covenant perpetuates that authority where the CNMI is concerned but takes care to limit

that legislative authority by requiring that if a law "...cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands." The legislative history of the Covenant indicates that this was done to assure "...that Congress will exercise its special authority under Article IV, section 3, clause 2 purposefully, after taking into account the particular circumstances existing in the Northern Marianas." House Hearings, supra, at 630 (Marianas Political Status Comm'n, Section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands). Clearly, the CNMI was not expressly or implicitly included within the ambit of section 204. Consequently, Covenant section 105 precludes application of section 204 of the Agricultural Act to the CNMI. See, e.g.,

Gale v. Andrus, 643 F.2d 826 (D.C. Cir. 1980).

The Territorial Clause does grant broad powers to the Congress for it carries the authority to enact laws which will have effect within the Commonwealth to a greater extent that it can do within a state. It does not, however, authorize the application of foreign affairs authority to the CNMI. Indeed, Covenant section 104 empowers the United States to conduct foreign affairs on behalf of the Commonwealth of the Northern Mariana Islands. It would be incongruous for the federal government to conduct foreign affairs on behalf of the CNMI while, at the same, regulate the Commonwealth as if it were a foreign country. How can the United States fulfill the promise of Covenant section 603(d), to "...seek to obtain from foreign countries favorable treatment for exports from the Northern Mariana

Islands..." and to "...encourage other countries to consider the Northern Mariana Islands a developing territory", while treating the Commonwealth as if it were a fully developed foreign country under its own regulations? Covenant section 605(b) precludes the CNMI from levying duties on goods imported into the Commonwealth from the United States. It would unfairly imbalance the trade relationship established in the Covenant negotiations to permit the United States to levy duty upon our goods under 19 C.F.R. 12.130.

The Commonwealth is not a party to any of the bilateral or multi-lateral textile trade agreements to which the United States is a party. Nor is the President authorized by section 204 to limit the exportation of such products into the United States from the Commonwealth by virtue of agreements obtained with "foreign countries" because the

Congress has clearly provided in both the Trusteeship Agreement and the Covenant that the CNMI is not to be regarded as "foreign" to the United States. The lower courts in this case have rendered decisions which are incompatible with United States obligations under these documents, and the policies expressed therein.

The American flag flies over the Commonwealth's Civic Center on Saipan and over the schools, and all public buildings in the CNMI. American English is the official language, the dollar is legal tender, and the zip code is 96950. The products of our industry should be considered to be American products and should not be restricted by the foreign affairs authority of the United States.

II. The lower courts have decided an important question of federal law in a manner in conflict with the stated Congressional policy goal of fostering economic and industrial development in the insular possessions of the United States.

The provisions of General Headnote 3(a), TSUS, represent the culmination of a long history of Congressional enactment of duty-free tariff treatment for products of insular possessions, based upon liberal origination requirements. Antecedent provisions to present Headnote 3(a) granting duty-free or preferential tariff treatment to products of insular possessions can be found in a long history of tariff legislation. See e.g. Customs Simplification Act of 1954, Pub. L. 768, § 401, 69 Stat. 1136; Tariff Act of 1930, § 301, 46 Stat. 590; Tariff Act of 1922, § 301, 42 Stat. 858; Tariff Act of 1913, § IV C, 38 Stat. 114; Tariff Act of 1909, § 5, 36 Stat. 11.

In the case of textile products, such as petitioner's sweaters, so long as the product does not contain foreign materials in excess of 50% of its total value, the processing and operations in the CNMI had long been recognized and accepted under General Headnote 3(a) as sufficient to confer origin status upon the CNMI, at least prior to the promulgation of the regulation, 19 C.F.R. 12.130, here in issue. See, e.g., U.S. Customs Service, Headquarters Ruling 71476, October 6, 1983 (Pet. App. 42a). This preferential treatment is consistent with the long-standing Congressional intent of conferring duty-free status under Headnote 3(a) to encourage the development of light industrial processing in the insular possessions and territories. As the island possessions lack sufficient resources to engage in major industrial manufacturing, the origin criteria in Headnote 3(a) was

recognized as a mechanism necessary to attract and stimulate business investment and encourage the establishment of light industrial processing and assembly operations in the possessions. See Senate Report No. 1679, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Ad. News 4390 (commenting on section 401 of the Customs Simplification Act of 1954, Pub. L. 768, 68 Stat. 1213, which preceded the enactment of General Headnote 3(a) in the Tariff Classification Act of 1962, Pub. L. 87-456, 76 Stat. 72).

This stated policy of fostering the economic and industrial development and self-sufficiency in the insular possessions does not stem from mere governmental charity nor fiscal prudence. Rather, it has been recognized that the exercise of United States sovereignty over a dependent people carries with it great moral obligations to

protect, defend and provide for the general welfare of its inhabitants:

> "...the obligations correlative to this great power are of the highest character, and...it is our unquestioned duty to make the interests of the people over whom we assert sovereignty the first and controlling consideration in all legislation and administration which concerns them, and to give them, to the greatest possible extent, individual freedom, self-government in accordance with their capacity, just and equal laws, and opportunity for education, for profitable industry, and for development in civilization."

Cincinnati Soap Company v. United States, 301 U.S. 308, 314 (1937) (citations omitted).

In addition to these moral imperatives which are generaly applicable to all possessions over which the Government asserts sovereignty, the United States, in section 701 of the Covenant has expressly agreed to assist in the economic development of the CNMI. One means by which the United States

assists in that economic development is by affording goods from the CNMI duty-free status upon entering the customs territory of the United States under General Headnote 3(a), as provided for in section 603(c) of the Covenant.

It is noteworthy that the history of our Commonwealth has been that of dominance by various sovereign powers -- first Spain in 1521, then Germany, Japan, and ultimately the United States under the auspices of the United Nations Trusteeship. In negotiating the Covenant with representatives of the Northern Marianas, the United States, consistent with the United Nations Trusteeship Agreement and recognized principles of international law, gave the citizens of the Northern Mariana Islands an opportunity to exercise freely their right to self-determination. All provisions of the Covenant were carefully negotiated, and comprised the

agreement under which the Islanders voted to associate themselves as a Commonwealth "in political union with and under the sovereignty of" the United States. Both parties undoubtedly perceived mutual benefits to be gained from this freely chosen association.

At the time the Covenant was negotiated and approved by the voters, there can be no doubt that the CNMI perceived that the customs treatment afforded their goods thereunder would be the same as that of Guam, which was duty-free entry into the United States for articles of the CNMI, so long as the value of the foreign content was 50% or less (70% for watches), consistent with the established policy of the United States and its Customs Service at that time. This was the manner in which section 603 of the Covenant was explained to the Islanders, and the understanding upon which they voted. See House Hearings, supra, at 647. Further, in

reliance on the clear and unambiguous import of section 603, the CNMI has stressed the favorable U.S. customs treatment under General Headnote 3(a) in our endeavor to stimulate new business investment and expand the admittedly limited manufacturing industry in the CNMI. See e.g., CNMI, Dep't of Commerce & Labor, Guidelines to Doing Business in the Commonwealth of the Northern Mariana Islands 26 (October 1, 1980) (hereinafter cited as "Guidelines").[2] It is not only inappropriate but ultra vires for the Customs Service now unilaterally to alter the tariff status granted the CNMI under the Covenant.

The change in the established country of origin requirements by virtue of 19 C.F.R. 12.130, may appear insignificant at first,

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2. A copy of the Guidelines has been lodged with the Clerk of the Court.

but in practice works a dramatic alteration of past customs treatment of articles of CNMI origin. By now requiring the "substantial transformation" of articles processed in the CNMI -- a stringent test heretofore not only not applied to products of insular possessions but to products from other countries as well -- numerous articles undergoing assembly or processing operations, which had previously received General Headnote 3(a) treatment as products of the CNMI, are now classified as products of the foreign nations from whence their basic material components originated, even though the ultimate product meets the foreign content limitation imposed under the headnote and considered to have been substantially processed in the CNMI. These articles may now not only become dutiable as products of "foreign countries," and subject to quotas or other restrictions on

imports from "foreign countries," but, as a result thereof, be effectively excluded from entry into the United States.

As a practical matter, business firms face certain difficulties in becoming established in the CNMI. The Commonwealth has a small population and an underdeveloped infrastructure, and is distant from suppliers and markets. Furthermore, the islands were the site of fierce conflict between forces of the United States and Japan during World War II, which devastated our major cities. See generally Senate Report (Interior & Insular Affairs Committee) No. 94-596, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. Code Cong. & Ad. News 448, 449; Guidelines, supra, at 2-3, 6-7. A firm, overcoming such obstacles, may make the necessary investment in plant and equipment, in securing a labor force, and in otherwise establishing a business in the CNMI

intending to sell in the United States goods manufactured, grown or produced in the CNMI. The firm most likely will have made its investment relying on the implicit assurance that its goods will be able to enter the customs territory of the United States without payment of duty pursuant to General Headnote 3(a). The imposition of quotas or other quantitative restrictions that limit the ability of the firm to bring its goods into the United States market is an abrupt frustration of the firm's expectations.

It takes few such abrupt frustrations before investors decide that attempting to establish a business in the CNMI that will bring goods to consumers in the United States is simply not worth the risk. The purpose of General Headnote 3(a), in providing favorable treatment for goods of the insular possessions and the CNMI, will have been defeated, and a possible avenue toward the

economic development of the CNMI will have been closed.

Only one industry, garment manufacturing, has been established in the CNMI with the objective of exporting goods into the customs territory of the United States. Nonetheless, in August 1984, less than a year after the first of these factories began production, the United States Customs Service issued regulations that curtailed the ability of CNMI garment manufacturers to import garments into the United States. T.D. 84-171, 49 Fed. Reg. 31248, August 3, 1984. This redefinition of country of origin rules for insular possessions was accomplished in utter disregard of the stated Congressional policy to promote development of insular possessions by emphasizing light industry and assembly operations. Customs, following guidelines from the Committee on Implementation of

Textile Agreements ("CITA"), ignored a century of United States economic policy regarding the insular possessions in pursuit of what it apparently considered to be an all-important, predominant end: preventing the circumvention of textile quota agreements. However, there is no evidence that the small garment industry in the CNMI circumvents the said textile quota agreements. Further, the new textile origination rules, moreover, created a complex, unmanageable system for determining the proper country of origin of textiles imported from the insular possessions, resulting in the designation of two "countries" as the country of origin for the same product, according to the distinct purposes served by the individual origin rules.

Import quotas may generally be imposed, pursuant to authority granted by law, for a variety of reasons: for example, to protect

domestic industry from serious economic injury from foreign competition; to implement or enforce international trade agreements; or to reduce U.S. balance of payments deficits, prevent depreciation of the dollar, or correct international balance of payments disequilibrium.

In the international arena, the United States acts for the CNMI under the Covenant, sections 104, and 1003(c), and formerly under the Trusteeship Agreement, articles 3, 5, 8(4), 10 and 11(2). To regulate the international trade of a particular commodity or product, the United States, in negotiating a bilateral or multilateral international agreement, could conceivably find it necessary to agree to limit imports of that commodity or product <u>into</u> the CNMI. But under no circumstances could the requirements of such an international agreement

justify the imposition of import quotas on trade between the CNMI and the United States.

The United States balance of payments is the difference between all payments made by the United States to all other nations in the world and the payments made to the United States by all other nations. However, the CNMI is within the area in which the United States dollar is legal tender. Covenant §502(a)(1). Further, the Commonwealth is under the sovereignty of the United States. Covenant §§101, 1003(c). The CNMI, accordingly, is part of the United States for balance of payments purposes, and imposing import quotas on goods entering the United States from the CNMI neither improves the balance of payments position of the United States nor affects the value of the dollar.

Establishing import quotas on goods entering the customs territory of the United

States from the CNMI may protect industries within that customs territory from competition and thus, from possible economic loss. The United States, however, should not act to protect industry within the customs territory of the United States from competition from the CNMI, any more than it should protect industry in one state from competition with another. This is particularly so when the United States is obligated to assist in the economic development of the CNMI. Covenant §701.

The United States has a legitimate interest in ensuring that foreign exporters do not use the CNMI as a "pass through" point, transshipping their goods through it in order to circumvent textile quota agreements. But the substantial processing of goods into a product is not transshipment, as recognized by Headnote 3(a) and prior Customs rulings. Processing operations on sweaters

in the United States insular possessions have long been recognized as a legitimate economic activity, conferring substantial developmental benefits on the possessions. The import of 19 C.F.R. 12.130 is to regard this same activity as improper and tainted as if illegal, and conclusively brand it as an attempt to avoid quota agreements negotiated with foreign countries. As currently applied, section 12.130 enforces this same origin rule against textiles from both major foreign country suppliers and from tiny island possessions of the United States, which are wholly dependent on the tariff preferences which embody Congress's commitment to them. Further, both the language and long-standing interpretation of General Headnote 3(a), requiring both a minimum local value content and substantial processing operations to qualify for duty-free treatment, ensure that articles meeting

this criteria will not have been merely "transshiped" through the insular possessions to avoid textile quota restraints.

The unfairness of the textile origin regulation as applied to the CNMI becomes even more apparent when seen in operation. Since Customs has determined that substantial processing of sweaters in the CNMI fall short of substantial transformation, it requires an export visa from the country in which the apparel components originated as a condition for entry from the insular possessions.[3] It is unrealistic to expect that countries whose textile products are

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3. By agreement between the CNMI and the CITA, the visa requirement is presently being waived for shipments of knit sweaters up to a specified volume from the CNMI and Guam. However, the visa requirement remains in effect for other apparel items and for sweaters in excess of the specified volume.

covered by quotas will voluntarily deplete their quota allowance by issuing export visas for materials shipped to and processed in the insular possessions, rather than being processed in the quota country and exported directly to the United States. Thus, the ultimate result is that development of the type of industry in the CNMI which is anticipated by General Headnote 3(a) is effectively limited to the level of production allowed, if at all, by the visa waiver system being presently utilized as a matter of grace by the CITA. The regulation creates a disincentive to business entities importing textile materials for processing in insular possessions and, thus, to locating processing plants in the insular possesions, all of which has a chilling effect on the economic and commercial development and self-sufficiency of the insular possessions and

the CNMI, in direct contravention of Congress's stated policy.

Amicus curiae submits that these important policy considerations should have been, but were not, given weight by the courts below.

III. The lower courts have sustained the validity of the subject regulation issued without due process and in violation of the Administrative Procedure Act as concerns the Commonwealth of the Northern Mariana Islands

When the Department of the Treasury published the interim regulation, T.D. 84-171, 49 Fed. Reg. 31248, August 3, 1984 (Pet. App. 105a-108a), it was announced that the public notice and comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. 551 et seq., would not be followed for the reason that "[p]ublic notice is inapplicable to these regulations because they are promulgated pursuant to section 204 of the Agricultural Act of 1956, as amended

(7 U.S.C. 1854), and are thus within the foreign affairs function of the U.S. and the foreign affairs exemption of 5 U.S.C. 553(a)(1)." 49 Fed. Reg. at 31251.

A primary purpose and intent of section 553 of the APA is to provide the public with reasonable notice and an opportunity to comment on proposed regulations before they take effect. Wagner Electric Corp. v. Volpe, 446 F.2d 1013, 1019 (3d Cir. 1972). The Court of International Trade found that the Customs Service did not provide reasonable notice in issuing the subject regulation, but the court excused the failure by finding that the regulation involved a "foreign affairs function" and so was exempt by virtue of 5 U.S.C. 553(a)(1). Mast Industries, Inc. v. Regan, op. cit. supra at 596 F. Supp. 1583.

For the reasons set forth in Point I, above, the Commonwealth of the Northern

Mariana Islands contends that this regulation is not a valid exercise of a foreign affairs function when applied to our United States Commonwealth, and so is not properly exempted from the notice and comment provisions of the APA.

Section 501 of our Covenant with the United States applies the due process provisions of the Constitution of the United States to the Commonwealth of the Northern Mariana Islands as if the Commonwealth were a state of the Union. The procedural requirements set out in the APA are held to be ". . . fundamental to due process . . ." Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D.W.Va. 1967); see Association of Nat'l Advertisers, Inc. v. F.T.C., 627 F.2d 1151, 1165 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). This again points out the inherent contradiction in regulating the Commonwealth of the Northern Mariana Islands

as if it were a foreign country when due process provisions apply there. Certainly the Customs Service could not have made these regulations applicable to the products of New York or Peoria, Illinois without affording due process.

The legislative history of the foreign affairs function exception to the APA is helpful:

> The phrase "foreign affairs functions" used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those "affairs" which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences.

Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 199, 257 (1947).

The Commonwealth of the Northern Mariana Islands respectfully submits that providing the Commonwealth and its manufacturers with reasonable notice of the interim rules and an opportunity to comment upon them would have provoked no such "definitely undesirable international consequences." Rather, it would have afforded us the due process promised in our Covenant with the United States. Section 904(a) of the Covenant also provides that "[t]he Government of the United States will give sympathetic consideration to the views of the Government of the Northern Mariana Islands. . . ." We submit that therefore the federal government may not be permitted to avoid the reasonable notice and comment provisions required under the APA when seeking to apply the subject regulation to products of the CNMI.

CONCLUSION

The courts below have determined that the country of origin criteria in 19 C.F.R. 12.130 could properly be applied to products of insular possessions, including the CNMI, without any apparent consideration of the explicit terms of the Trusteeship Agreement and the Covenant, nor of the moral obligations of the United States to its possessions and dependencies, nor of Congress's long-established policy of fostering the development of industry in the insular possessions underlying General Headnote 3(a), nor even of the regulation's practical effect of frustrating those stated goals. The Commonwealth of the Northern Mariana Islands respectfully submits that the lower courts' judgments are, in fact, in conflict with these aforementioned considerations. The CNMI also perceives certain due process and procedural irregulatities in the manner in

which the regulation was promulgated. Consequently, amicus curiae respectfully urges that the detrimental effect of the lower court's opinions in this case should be addressed and remedied by the Supreme Court.

Respectfully submitted,

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